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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

JOHN CLEVELAND, VENANT JOSEPH, RUDDY PEART, GARNETT BURTON, PETER MATHURIN, PATRICK PHILLIP, GREGORY SCHELL, SARAH CLEVELAND, T.A. WYNER, AND THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC.,

Petitioners,

v.

DOROTHY WILKEN, CLERK OF COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, AND ROBERT BUTTERWORTH, in his official capacity as Attorney General of the State of Florida,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether appellate review of a District Court's decision to abstain under *Pullman* is deferential or *de novo*?

2. Whether *Pullman* abstention is proper for plaintiffs whose federal claims are not affected by state law merely because they are joined with other plaintiffs' claims which potentially are?

3. Whether pending state proceedings justify both *Pullman* abstention and a federal court's refusal to use adequate state certification procedures?

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Eleventh Circuit, entered on April 3, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is not reported[1] and is reprinted in the Appendix, (App., *infra*, 1). The opinion of the United States District Court for the Southern District of Florida is not reported and is reprinted in the Appendix, (App., *infra*, 4).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on November 20, 1997. The United States Court of Appeals for the Eleventh Circuit denied timely petitions for rehearing and rehearing en banc on April 3, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

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[1] *See Comm'r of Internal Revenue v. McCoy*, 484 U.S. 3, 7 (1987) ("the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case."); *Smith v. U.S.*, 502 U.S. 1017, 1020 n.* (1991) (Blackman, J., dissenting) ("The fact that the Court of Appeals' opinion is unpublished is irrelevant. Non-publication must not be a convenient means to prevent review.").

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331 and 1343, this being a federal constitutional challenge brought under 42 U.S.C. § 1983. Petitioners consist of seven individuals, six indigent and one non-indigent, who live outside the state of Florida and who either have filed,[2] or who seek to file,[3] civil actions in Florida's state courts. (R.11). Six are migrant workers. Two additional Petitioners are licensed lawyers in Florida who either represent or who have represented indigent and non-indigent migrant workers in state court proceedings. (*Id.*) Lastly, the American Civil Liberties Union of Florida, Inc. ("ACLU"), a Florida non-profit corporation which provides litigation costs to lawyers and non-resident plaintiffs in Florida's courts, irrespective of indigency, joins as a Petitioner in this litigation. (*Id.*)

Petitioners challenge Florida's non-resident bond requirement (codified at Fla. Stat. Ann. § 57.011), which requires all plaintiffs living outside the state to post $100 bonds in order to pursue claims in Florida's state courts. Florida law holds both the plaintiff and lawyer personally

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[2] Petitioners, Garnett Burton, Peter Mathurin and Patrick Phillip, are indigent plaintiffs in *Brown v. Atlantic Sugar Ass'n*, No. CL-91-3107-AO (Fla. 15th Jud. Cir.). Petitioners, Venant Joseph and Ruddy Peart, are plaintiffs in *Joseph v. Okeclanta Corp.*, No. CL-91-3105-AO (Fla. 15th Jud. Cir.). Joseph is indigent, Peart is not (R.11).

[3] Petitioner, John Cleveland, is indigent, and has no action pending in state court. Petitioner, T.A. Wyner, is indigent and has separate actions pending in state court. (R.11).

responsible for this bond. Petitioners have been threatened with dismissals of pending state court proceedings and have been threatened with personal liability for the required bond.

Petitioners filed the present action under 42 U.S.C. § 1983 on December 21, 1995 against the Clerk of Florida's Fifteenth Judicial Circuit (a local governmental official) and the State's Attorney General (hereinafter referred to collectively as "the State"). Petitioners, *inter alia*, argue that Florida's bond requirement facially violates Article I, § 8 (the "Dormant Commerce Clause") and Article IV, § 2 (the "Privileges and Immunities Clause") of the United States Constitution, because it discriminates between resident and non-resident plaintiffs. The State claimed, in response, that *indigent* non-resident plaintiffs may be entitled to waivers under either Article I, § 21 of the Florida Constitution (governing access to courts), or Fla. Stat. Ann. § 57.081(1) (governing *in forma pauperis* proceedings). The state therefore argued that these state law issues justified federal abstention in favor of state court proceedings.

On February 27, 1996, the District Court denied Petitioners' Motion for Preliminary Injunction and abstained from further proceedings "pending resolution of Plaintiffs' state court claims in state court." (App., *infra*, 13). On March 26, 1996, Petitioners filed their Notice of Appeal and moved the Eleventh Circuit to certify the state law issues to the Florida Supreme Court pursuant to Florida's certification procedure. (R.27).

On November 20, 1997, a three-judge panel, Judges Anderson, Edmondson and Rosenn, held that abstention was proper as to all Petitioners, regardless of indigency,

and refused to certify the indigency exception question to the Florida Supreme Court. (App., *infra*, 2-3). Petitioners thereafter moved for Rehearing and suggested Rehearing En Banc. This motion was denied on April 3, 1998.

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT'S ABUSE OF DISCRETION STANDARD CONFLICTS WITH THE DE NOVO REVIEW STANDARDS OF THE SECOND, THIRD, FIFTH, NINTH AND TENTH CIRCUITS.

The District Court abstained under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), because it felt that state law, particularly Article I, § 21 (governing access to courts) of the Florida Constitution, might provide indigent non-resident plaintiffs an exception to the statutory bond requirement. (App., *infra*, 10.) The Eleventh Circuit affirmed because it found that state law "could provide a definitive interpretation of the Florida statute which may substantially modify the federal question in this split issue case." (App., *infra*, 2).

The long-standing rule in the Eleventh Circuit is that decisions to abstain and not to abstain under *Pullman* are reviewable only for an abuse of discretion. *See Stone v. Wall*, 135 F.3d 1438, 1441 (11th Cir. 1998) ("We reverse a district court's decision to abstain when there is an abuse of discretion."); *Rindley v. Gallagher*, 929 F.2d 1552, 1554 (11th Cir. 1991) ("In the Eleventh Circuit, a district court's decision to abstain will only be reversed upon a showing of abuse of discretion."); *Casines v. Murchek*, 766 F.2d

1494, 1502 (11th Cir. 1985) (*Pullman* abstention subject to review only for abuse of discretion).

Petitioners argued before the Eleventh Circuit that a *de novo* standard of review ought to be applied to the District Court's affirmative decision to abstain under *Pullman*. Although the Eleventh Circuit failed to cite any relevant standard of review in its two-page, per curiam decision, well-established Eleventh Circuit precedent and the Eleventh Circuit's cursory decision to abstain as to even non-indigent Petitioners[4] establish that it reviewed the District Court's abstention decision only for an abuse of discretion.

Every other circuit that has addressed this question has applied a *de novo* standard of review for abstention decisions. While the decision *not* to abstain is generally subjected to an abuse of discretion standard, these circuits agree that whether a case fits within the narrow *Pullman* abstention requirements is reviewed *de novo*.

The Third Circuit, for instance, has held that

> [i]n reviewing a district court's abstention decision, we apply two separate standards of review. The district court's determinations as to the first two "special circumstances", that is, whether state law is uncertain and whether state law is amenable to a construction that would obviate or narrow the constitutional issues presented, are essentially legal decisions which are to be reviewed *de novo* by this court,. . . .

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[4] *See infra* at 8-13.

Chez Sez III Corp. v. Township of Union, 945 F.2d 628, 631 (3d Cir. 1991) (discussing *Pullman*.)

The Second Circuit likewise has stated that *Pullman* "[a]bstention is a narrow exception to the generally broad duty of federal courts to exercise jurisdiction. There is little, if any, discretion to abstain in a case which does not meet the requirements of a particular abstention principle." *Planned Parenthood of Dutchess-Ulster v. Steinhaus*, 60 F.3d 122, 126 (2d Cir. 1995).

The Fifth Circuit initially declared that *both* affirmative abstention and its rejection are reviewed *de novo*. *See United Home Rentals v. Texas Real Estate Commission*, 716 F.2d 324, 332 n.19 (5th Cir. 1983) ("review of the district court's refusal to abstain is predicated on a *de novo* standard."); *O'Hair v. White*, 675 F.2d 680 (5th Cir. 1982). It recently joined the Second and Third Circuits, however, and declared that a *de novo* standard applies only to whether the conditions of *Pullman* abstention are met. Assuming these conditions are met, a decision not to abstain is reviewed for an abuse of discretion. *See Louisiana Debating and Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1489 (5th Cir. 1995).

The Ninth and Tenth Circuits are in agreement with the Second, Third and Fifth. While they review "the decision not to abstain for an abuse of discretion," *Cedar Shake and Shingle Bureau v. City of Los Angeles*, 997 F.2d 620, 622 (9th Cir. 1993), they agree that "[a] district court has no discretion to abstain where the abstention requirements are not met; whether those requirements are met is reviewed *de novo*." *Id. See also Garamendi v. Allstate Ins.*

Co., 47 F.3d 350, 354 (9th Cir. 1995) ("[t]here is no discretion to abstain in a case that does not meet the requirements of the abstention doctrine being invoked. We review whether those requirements are met *de novo.*"), *aff'd sub nom. on other grounds, Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996). "The question of the clarity of state law is essentially legal in nature and our review is *de novo.*" *Vinyard v. King*, 655 F.2d 1016, 1019 (10th Cir. 1981) (discussing *Pullman* abstention).

Because the Eleventh Circuit's deferential standard of review for an affirmative decision to abstain contradicts the standard applied in every other circuit, this Court should grant certiorari to resolve the conflict. *See* Supreme Court Rule 10.1(a). The Eleventh Circuit appears to be the only circuit applying a deferential standard of review. This Court has yet to expressly resolve this important issue. Its most recent abstention decision, *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996), appeared to address the propriety of a lower court's abstention decision *de novo*. The Court was not asked in *Quackenbush*, however, to state the proper standard of review. Similarly, this Court's holding in *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989) (*NOPSI*), which overturned a lower court's decision to abstain, suggests a stringent standard of appellate review. Again, the Court was not asked in *NOPSI* to rule on the proper standard of review, and thus the matter remains open.

II. THE ELEVENTH CIRCUIT ERRED IN ORDERING ABSTENTION FOR NON-INDIGENT PETITIONERS WHOSE CLAIMS WILL NOT AND CANNOT BE AFFECTED NOR MODIFIED BY AN INDIGENCY EXCEPTION.

Pullman abstention is predicated on two conditions: first, state law must be ambiguous, and second, state law must potentially resolve or modify the case so that federal constitutional issues can be avoided. *See, e.g., City of Houston v. Hill*, 482 U.S. 451, 468 (1987). In the present case, the District Court found that abstention was proper because the Florida Constitution might admit an indigency exception to its non-resident bond requirement. Similarly, the State argued on appeal that state statutory law, specifically Fla. Stat. Ann. § 57.081(1), which provides for waivers of fees for individuals proceeding *in forma pauperis*, might provide an exception for indigents.[5] Relying on these possibilities, the Eleventh Circuit concluded that state law "could provide a definitive interpretation of the Florida statute which may substantially

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[5] Even if the State is correct, the indigency exception created by Fla. Stat. Ann. § 57.081(1) itself discriminates. It requires that as a condition of indigency one must certify that "no person has been paid or promised any payment of any remuneration by the applicant for services performed on behalf of the applicant in connection with the action or proceeding." *Id.* An attorney who represents an indigent plaintiff, meanwhile, must certify that she "has not been paid or promised payment of any remuneration for services and intends to act as attorney for the applicant without compensation." *Id.* Hence, while residents can proceed without posting the bond and with compensated counsel, non-residents can have the bond waived only if they waive their right to compensated counsel.

modify the federal question in this split-issue case." (App., *infra*, 2).

Assuming that both the Florida Constitution and Fla. Stat. Ann. § 57.081(1) allow exceptions to Florida's non-resident bond requirement and justify abstention as to those Petitioners who are indigent, *Pullman* abstention is still not warranted for the four Petitioners who are not indigent. While the Eleventh Circuit noted the presence of non-indigent Plaintiffs, it held that *Pullman* abstention was proper for all, indigent and non-indigent alike:

> The non-indigent plaintiff who has brought only this instant federal action and has not sued in the state court asserts his claims cannot be raised in the state court litigation. It may well be that even as to his claim, . . . a consideration of the constitutional questions raised in the federal action may be rendered unnecessary.

(App., *infra*, 2).

How an indigency exception might benefit non-indigent plaintiffs, as well as their attorneys and representatives, is left unexplained by the Eleventh Circuit. Indeed, no one has ever suggested that Florida law allows, or even theoretically might allow, non-indigent plaintiffs the luxury of bypassing Florida's non-resident bond requirement.

Petitioners claim that Florida's bond requirement facially violates the Privileges and Immunities Clause and the Dormant Commerce Clause. Both of these constitutional provisions prohibit discrimination against citizens based on their residence. *See Camps Newfound/ Owatanna, Inc. v. Town of Harrison*, 117 S. Ct. 1590 (1997)

(denial of tax exemption to camps operated principally for non-residents violates Dormant Commerce Clause); *Lunding v. New York Tax Appeals Tribunal*, 118 S. Ct. 766 (1998) (denial of tax deduction to non-resident violates Privileges and Immunities Clause). Indeed, in *Howlett v. Rose*, 496 U.S. 356, 382 n.26 (1990), this Court stated that the "privileges and immunities clause requires a state to accord to citizens of other states the same right of access to its courts as it accords to its own citizens." According free access to residents while forcing non-residents to either pay or seek an indigency exemption is not "the same right of access" addressed in *Howlett*. Even assuming that state law admits an indigency exception, Petitioners' discrimination claims remain. Petitioners who can afford to pay are required to post bonds that state residents, indigent or not, are not. While an indigency exception might affect the claims of indigent plaintiffs,[6] it has nothing to do with the claims of non-indigents.

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[6] Even the constitutional claims of indigent Petitioners will remain following abstention. Their claim is one of disparate treatment based on their non-resident status. An indigency exception for non-residents cannot cure the disparate treatment they suffer when similarly situated residents are not required to seek an exemption. While residents proceed directly to court without posting a bond, non-residents must either post the bond or prove indigency. Rather than resolve the constitutional question, this begs it. *See also supra* note 5 (indigents must waive right to compensated counsel). This Court has recognized facial injuries based on disparate treatment in cases arising under the Fourteenth Amendment Equal Protection Clause. *See Northeastern Florida Chapter of Associated General Contractors v. City of Jacksonville*, 508 U.S. 656 (1993). It has also noted that abstention is inappropriate in the context of facial constitutional challenges. *See City of Houston v. Hill*, 482 U.S. 451, 467 (1987)

The Eleventh Circuit's decision creates an "abstention by association" exception to the limits of *Pullman*. Under that court's ruling, when a plaintiff with a proper and timely federal claim in federal court joins a plaintiff subject to *Pullman* abstention, the district court must abstain as to both. This Court has rejected this argument in the only abstention context in which it has been raised – *Younger v. Harris*, 401 U.S. 37 (1971). In *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928 (1975), the Court rejected the claim that "three plaintiffs should automatically be thrown into the same hopper for *Younger* purposes. . . . " Although "on occasion there will be duplicating and overlapping adjudication of cases which are sufficiently similar in content, time, and location to justify being heard before a single judge had they arisen within a unitary system," *id.*, "each of the [parties] should be placed in the position required by our cases as if that [party] stood alone." *Id.* at 29.[7] *See also Steffel v. Thompson*, 415 U.S. 452 (1974) (same).

("we have been particularly reluctant to abstain in cases involving facial challenges based on the First Amendment."); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 140 n.3 (1970) (holding abstention improper in the context of the Dormant Commerce Clause). *See also Alliance For Clean Coal v. Bayh*, 888 F. Supp. 924 (S.D. Ind.), *aff'd*, 72 F.3d 556 (7th Cir. 1995) (holding abstention improper where plaintiffs raised facial claim under Dormant Commerce Clause).

[7] The Court noted that "there plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to *Younger* considerations which govern any one of them. . . . " 422 U.S. at 928. However, even though all the *Younger* plaintiffs "were represented by common counsel, and have similar business activities and problems," *id.* at 929, "they are apparently unrelated in terms of ownership, control, and management," *id.*, and thus were

Since *Doran* and *Steffel*, the rule has been well-established that federal courts should not abstain under *Younger* where the plaintiff is not the target of state court proceedings, even if others are. *See, e.g., Gottfried v. Medical Planning Services*, 1998 WL 177955 (6th Cir. 1998) ("*Younger* abstention does not apply because [plaintiff] has not violated the injunction and is not the target of a pending prosecution in state court.") No court, other than the lower courts here, has held that a plaintiff whose claim is not properly subject to *Pullman* abstention must await state court proceedings involving co-plaintiffs' claims that are. *See, e.g., America's Best Family Showplace Corp. v. City of New York*, 530 F. Supp. 607, 610 n.5 (E.D.N.Y. 1982) ("the *Doran* case is no less dispositive because the abstention issue arose under the *Younger* abstention doctrine, rather than the *Pullman* abstention doctrine relied on by defendants in this case.").

This issue is ripe for certiorari because the Eleventh Circuit disregarded the well-established abstention precedent of this Court. *See* Supreme Court Rule 10.1(c). *Pullman* abstention is predicated on a possibility of avoiding federal constitutional issues. *Hill*, 482 U.S. at 468. Nonresident plaintiffs who are not indigent will continue to be treated differently regardless of whether Florida creates an indigency exception. Four Petitioners in this case

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subject to independent treatment under *Younger*. *Id.* In the present case, non-indigent Petitioners are not related in any way to the indigent Petitioners, and thus do not fall into this "closely related" exception. *Cf. Marks v. Stinson*, 19 F.3d 873, 884 n.7 (3rd Cir. 1994) (reserving "for another day" whether candidates and voters are "closely related" for purposes of *Younger*).

are either not indigent or represent non-indigent plaintiffs. Not all the Petitioners even have claims pending in state court. Their constitutional claims should not be thrown into the same hopper with the claims of indigent plaintiffs suing in state court. *See Doran*, 422 U.S. 922; *Steffel*, 415 U.S. 452.

III. THE ELEVENTH CIRCUIT ERRED BY ABSTAINING AND NOT CERTIFYING THE RELEVANT STATE LAW QUESTIONS TO THE FLORIDA SUPREME COURT NOTWITHSTANDING ADEQUATE STATE CERTIFICATION PROCEDURES.

Florida Rule of Appellate Procedure 9.150(a) allows the Florida Supreme Court to receive and answer questions certified to it by federal appellate courts. It states:

> On either its own motion or that of a party, the Supreme Court of the United States or a United States court of appeals may certify a question of law to the Supreme Court of Florida if the answer is determinative of the cause and there is no controlling precedent of the Supreme Court of Florida.

Fla. R. App. P. 9.150(a). Both this Court and the courts of appeals have used this procedure on numerous occasions in the past. *See Lehman Bros. v. Schein*, 416 U.S. 386, 390 & nn.5 & 6 (1974) (collecting cases). Indeed, Florida was the first state to offer such a procedure. *See Clay v. Sun Insurance Office Ltd.*, 363 U.S. 207 (1960).

This Court has often trumpeted an "adequate certification procedure"[8] as "sav[ing] time, energy, and resources and help[ing] build a cooperative judicial federalism." *Bellotti v. Baird*, 428 U.S. 132, 151 (1976). In *Bellotti*, where the district court had abstained and enjoined enforcement of the state abortion law pending a state court's resolution of the state law issues, this Court directed the lower court to certify the question pursuant to local law.

More recently, *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1073 (1997), stated:

> Certification today covers territory once dominated by a federal device called "*Pullman* abstention,". . . . Designed to avoid federal-court error in deciding state-law questions antecedent to federal constitutional issues, . . . *Pullman* abstention proved protracted and expensive in practice, for it entailed a full round of litigation in the state-court system before any resumption of proceedings in federal court. . . .
>
> Certification procedure, in contrast, allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response.

(Citations omitted).

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[8] There is no argument over the adequacy of Florida's procedures. The Florida Constitution grants jurisdiction to the Florida Supreme Court to entertain questions certified to it by a United States Court of Appeals or the Supreme Court, *see* Art. V, § 3(b) (6), Fla. Const., and the Florida Supreme Court continues to willingly answer certified questions. *See, e.g., Strochak v. Federal Insurance Co.*, 707 So. 2d 727 (Fla. 1998).

Petitioners moved for certification pursuant to Rule 9.150(a) immediately after filing their Notice of Appeal. This motion was carried with the case and was ultimately denied by the Eleventh Circuit. Disregarding the fact that not all Petitioners had actions pending in state court, the Eleventh Circuit justified its refusal only on the basis of "proceedings now pending in the state court." (App., *infra*, 2).

While this Court has never stated that certification is necessary to abstention, it has found that the availability of certification makes the abstention analysis easier. In *Bellotti*, it stated that while it did not "mean to intimate that abstention would be improper in this case were certification not possible, the availability of certification greatly simplifies the analysis." 428 U.S. at 151. Certification thus justifies abstention in close cases.

The question here focuses on the grounds necessary to justify a federal court's *refusal* to certify state law questions pursuant to an otherwise adequate procedure when it has decided to abstain. The Eleventh Circuit ruled that pending state proceedings not only justified *Pullman* abstention, but also justified not certifying the state law questions it thought otherwise dispositive. This holding contradicts the strong suggestion in *Arizonans for Official English* that courts use certification procedures to answer state law issues rather than abstention. There the Court reasoned that because "*Pullman* abstention proved protracted and expensive in practice, for it entailed a full round of litigation in the state-court system before any resumption of proceedings in federal court," 117 S. Ct. at

1073, certification was the preferred course. Certification "allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Id.* Hence, it is because certification avoids a "full round of litigation in the state-court system" that it should be used. Refusing to certify because of a "full round of state-court litigation" turns the logic of *Arizonans for Official English* on its head.

This Court has never chosen abstention over certification. While it has held that certification is not proper where abstention is unnecessary, *see, e.g., City of Houston v. Hill*, 482 U.S. 451, 468-69 (1987),[9] once it becomes clear that abstention is proper because state law is unsettled this Court has *always* directed the lower courts to use state certification procedures. This Court has not only used Florida's certification procedure, *see Aldrich v. Aldrich*, 375 U.S. 249 (1963); *Dresner v. City of Tallahassee*, 375 U.S. 136 (1963), but has used or instructed lower courts to use other states' certification procedures on a regular basis. *See, e.g., Bellotti v. Baird*, 428 U.S. 132, 151

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[9] While it is generally understood that the decision to certify rests in the discretion of the court, *see Lehman Bros.*, 416 U.S. at 391, this discretion presupposes that state law may or may not be unsettled. Once the court has decided that state law is unsettled enough to justify abstention, it cannot credibly argue that state law is clear enough to avoid certification. It likewise should not be heard to argue that the inefficiency of protracted state proceedings is preferable to quick and certain resolution by the state supreme court. *See Arizonans for Official English*, 117 S. Ct. 1055.

(1976) ("We [] hold that the District Court should have certified to the Supreme Judicial Court of Massachusetts appropriate questions. . . . "); *Elkins v. Moreno*, 435 U.S. 647, 668 (1978) (certifying questions to Maryland Court of Appeals); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 398 (1988) (certifying questions to Virginia Supreme Court). *See also Lehman Bros. v. Schein*, 416 U.S. 386, 391-92 (1974) (vacating and remanding so that lower court might consider certification to Florida Supreme Court).

The lower courts have largely followed this Court's advice to choose certification over abstention.[10] While observing that certification is discretionary and need not be invoked in the absence of abstention, *see, e.g., Copier v. Smith & Wesson Corp.*, 138 F.3d 833, 838 (10th Cir. 1998), the various districts and circuits with local certification procedures make regular use of them when abstention appears otherwise appropriate. *See, e.g., Jayaraj v. Scappini*, 66 F.3d 36, 40 (2d Cir. 1995) (directing lower court to certify questions to Connecticut Supreme Court); *Summit Medical Associates v. James*, 984 F. Supp. 1404, 1438 (N.D. Ala. 1998) ("heed[ing] counsel of the unanimous Supreme Court in *Arizonans for Official English* . . . " and certifying state law issues to Alabama Supreme Court); *Virginia Society for Human Life v. Caldwell*, 906 F. Supp. 1071 (W.D. Va. 1995) (certifying question to Virginia Supreme Court); *Lansing Mercy Ambulance Service v. Tri-County Emergency Medical Control Authority*, 893 F. Supp. 1337 (W.D. Mich.

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[10] Scholars too have also praised certification as a preferred choice over abstention. *See, e.g.*, Martha A. Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590, 605-06 (1977).

1995) (certifying issues to Michigan Supreme Court), *aff'd on other grounds*, 125 F.3d 855 (6th Cir. 1997). *See also* Proposed Long Range Plan for the Federal Courts, Recommendation 7, at 27 (November 1994) ("The states should be encouraged to adopt certification procedures, where they do not currently exist, under which federal courts (both trial and appellate) could submit novel or difficult state law questions to state supreme courts.") The First Circuit has gone so far as to hold that "[w]hile uncertainty or difficulty regarding state law is generally not sufficient to justify traditional abstention, it may be enough to counsel certification where that procedure is available." *Pyle v. South Hadley School Committee*, 55 F.3d 20, 22 (1st Cir. 1995). Hence, in the First Circuit it appears that certification will always obtain where abstention is warranted, and will even be proper on occasion when it is not.[11]

Where abstention is warranted and certification procedures exist, the presumption is in favor of certification. *See* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U.

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[11] Strangely, the Eleventh Circuit between 1990 and 1994 had one of the higher certification rates in the country. *See* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1549 n.476 (1997) (noting that the Eleventh Circuit had a 91% certification rate). Since 1994 it has continued to certify questions. *See, e.g., Roe v. Alabama*, 43 F.3d 574, 582-83 (11th Cir. 1995) (certifying to Alabama Supreme Court); *Stone v. Wall*, 135 F.3d 1438, 1443 (11th Cir. 1998) (certifying question to Supreme Court of Florida).

PA. L. REV. 1459, 1550-56 (1997) (arguing for a presumption in favor of certification). In the absence of strong countervailing reasons that overcome efficiency and the ultimate authority of the state's highest court, *see Arizonans for Official English*, a federal court should certify state law questions that justify abstention to the state supreme court. Because the Eleventh Circuit's refusal to certify was based only on the pendency of state court proceedings, its opinion contradicts the express language of *Arizonans for Official English* and the established practice of this Court, *see, e.g., Bellotti, Lehman, Virginia Booksellers*, and virtually every other circuit. *See, e.g., Pyle*, 55 F.3d at 22. This Court should grant certiorari in order to make it clear that in the absence of strong countervailing reasons, certification is the preferred course and should be used once the lower court finds state law unsettled enough to support abstention. *See* Supreme Court Rule 10.1(a) & (c).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 96-4424

D.C. Docket No. 95-8784-CV-JAG

JOHN CLEVELAND, VENANT JOSEPH, RUDDY PEART, GARNETT BURTON, PETER MATHURIN, PATRICK PHILLIP, GREGORY SCHELL, SARAH CLEVELAND, T.A. WYNER, AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INCORPORATED,

Plaintiffs-Appellants,

versus

CLERK OF COURT, FIFTEENTH JUDICIAL CIRCUIT, Dorothy Wilken as Clerk of Court, ATTORNEY GENERAL, STATE OF FLORIDA, Robert Butterworth in his official capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(November 20, 1997)

Before ANDERSON and EDMONDSON, Circuit Judges, and ROSENN*, Senior Circuit Judge.

PER CURIAM:

Whether § 57.011 of the Florida Statutes will be interpreted to provide an exception from the bond requirement for indigents and their counsel is an issue which could be readily raised in pending state court proceedings involving some of the instant plaintiffs. The resolution of that issue in the state court could provide a definitive interpretation of the Florida statute which may substantially modify the federal question in this split-issue case.

The non-indigent plaintiff who has brought only this instant federal action and has not sued in the state court asserts his claims cannot be raised in the state court litigation. It may well be that even as to his claim, when the several sections of the Florida Constitution are examined by the state court in light of Article I, section 21 of the Florida Constitution which provides for access "to every person for redress of any injury," a consideration of the constitutional questions raised in the federal action may be rendered unnecessary. Moreover, pragmatic considerations also support the district court's decision to abstain as to the federal questions. It is entirely possible that the Florida courts may resolve the issue raised on state statutory and constitutional grounds without requiring the federal courts to reach federal constitutional questions, thereby avoiding needless costs and expenses to

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*Honorable Max Rosenn, Senior U.S. Circuit Judge for the Third Circuit, sitting by designation.

the parties, to the judicial system, and delay to other litigants who are compelled to wait by what may be unnecessary complex federal proceedings until their suits can be heard. See *Rogers v. Desiderio*, 58 F.3d 299, 300 (7th Cir. 1995).

Appellants' challenge to the district court's decision denying their motion for a preliminary injunction is rejected for failure to demonstrate an irreparable injury warranting such extraordinary relief. They have not shown that they attempted to utilize § 57.081(1), which offers an exemption from the prepayment of costs for any party who obtains a certificate of indigency from the Clerk. The appellants also have not shown that the attorneys who represent indigent clients were denied waiver of costs under § 57.081(1) by filing an appropriate certificate asserting that their clients are indigent and that their attorneys will not be compensated for services rendered to such clients. As for a non-indigent party, submitting a cost bond, if required, pending disposition of this litigation will not constitute an irreparable injury.

Finally, the request that we certify the question of law to the Supreme Court of Florida is denied in light of the proceedings now pending in the state court.

Accordingly, the judgment of the district court abstaining in this case is

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOHN CLEVELAND, VENANT JOSEPH RUDDY PEART, GARNETT BURTON, PETER MATHURIN, PATRICK PHILLIP, GREGORY SCHELL, SARAH CLEVELAND, T. A. WYNER, and the AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC.,

Plaintiffs,

v.

DOROTHY WILKEN, CLERK OF COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, and ROBERT BUTTERWORTH, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF FLORIDA,

Defendant.

CASE NO. 95-8784-CIV-GONZALEZ

ORDER

(Filed Feb. 27, 1996)

Plaintiffs in this case are migrant farm workers and their legal services attorneys, a civil rights activist, and the American Civil Liberties Union of Florida, Inc. According to Plaintiffs, Florida Statute § 57.001 [sic] imposes upon them a constitutionally impermissible burden, and has barred or threatens to bar their access to state courts. The challenged section provides as follows:

> When a nonresident plaintiff begins an action or when a plaintiff after beginning an action removes himself or his effects from the state, he shall file a bond with surety to be approved by the clerk of $100, conditioned to pay all costs which may be adjudged against him in said action in the court in which the action is brought. On failure to file such bond within 30 days after such commencement or such removal, the defendant may, after 20 days notice to plaintiff (during which the plaintiff may file such bond), move to dismiss the action or may hold the attorney bringing or prosecuting the action liable for said costs and if they are adjudged against plaintiff, an execution shall issue against said attorney.

Fla.Stat. § 57.001 [sic]. Significantly, Plaintiffs argue, the Florida Legislature has not imposed a similar bond requirement upon resident plaintiffs, nonresident defendants, or defendants who remove their assets from Florida, nor has it included any provision to accommodate the inability of indigent plaintiffs to afford the bond.

One case in which a court considered a situation similar to that presented here is *Clopper v. Merrill Lynch Relocation Management, Inc.*, 812 F.2d 1116 (9th Cir. 1987). The court in that case considered the constitutionality of Or.Rev.Stat. § 20.160, which provides:

> Liability of attorney of nonresident or foreign corporation plaintiff; security for costs. The attorney of a plaintiff who resides out of the state or is a foreign corporation, against whom costs are adjudged in favor of a defendant, is

> liable to the defendant therefor; and if the attorney neglects to pay the same, upon the information of the defendant shall be punished as for a contempt. The attorney may relieve or discharge the attorney from such liability by filing an undertaking at the commencement of the action or suit, or at any time thereafter before judgment or decree, for the payment to the defendant of the costs and disbursements that may be adjudged to the attorney, executed by one or more sufficient sureties.

Or.Rev.Stat. § 20.160, *quoted in Clopper,* at 1119. This provision is supplemented by § 20.170, which provides:

> Qualification of and exception to sureties; deposit in lieu of undertaking. The sureties in the undertaking described in Or.Rev.Stat. § 20.160 shall possess the qualifications of sureties in an undertaking for bail on arrest, and their sufficiency may be excepted to by the defendant at any time within five days from notice of filing the same, and if so, they shall justify in an amount not less than $200, in like manner and with like effect as sureties for bail on arrest. Until the time for excepting to the sufficiency of the sureties has expired or, if excepted to, until they are found sufficient, the attorney is liable as if no undertaking had been given. A deposit of $200 or other sum which the court or judge may direct, with the clerk, may be made in lieu of such undertaking.

Id.

The Court in *Clopper* first rejected the plaintiff's argument that the above provisions violated the Privileges and Immunities Clause of the Constitution, which "does

not," the court held, "preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it." *Toomer v. Witsell*, 334 U.S. 385, 396 (1948), *reh'g denied*, 335 U.S. 837 (1948), *quoted in Clopper*, at 1121. Thus, the Court held that the additional burden created by § 20.160 were justified by the "potential added difficulty of collecting costs from nonresidents. . . . " *Clopper*, at 1121.

The court next held that even if the challenged statute impeded the plaintiff's right to travel, it was not so restrictive or burdensome as to violate the Constitution. The court also rejected the plaintiff's equal protection argument after finding that no fundamental right had been interfered with. *Id.*, at 1123. Finally, the court rejected the argument that the challenged ordinance impermissibly burdened interstate commerce. *Id.*

The First Circuit Court of Appeals has also rejected the argument that a non-resident bond requirement is unconstitutional. *Hawes v. Club Ecuestre El Comandante*, 535 F.2d 140 (1st Cir. 1976). After holding that the plaintiffs' fundamental rights to travel and access to the courts were not impinged by the bond requirement, the court applied the rational basis test and rejected the plaintiffs' equal protection challenges. *Id.*, at 144-145. The court in *Hawes*, however, placed significant emphasis on the fact that the local rule being challenged allowed a district court to dispense with the bond requirement when necessary to assure a plaintiff's access to the court. *Id.*, at 143-44. Moreover, the court made clear that a district court applying the rule at issue was to consider, among other factors, "[any] ownership by a nondomiciliary

plaintiff of attachable property in the district, the likelihood of success on the merits, the presence of a co-plaintiff who is domiciled in the district, the probable length and complexity of the litigation, the conduct of the litigants, and the purposes of the litigation." *Id.*, at 144. In closing, the court noted "that 'to require all foreign plaintiffs, as such, to post substantial security as a condition to access to the courts may well be an unconstitutional denial of equal protection.' " *Id., quoting Coady v. Aquadilla Terminal Inc.*, 456 F.2d 677, 679 (1st Cir. 1972).

In a later case, placing particular emphasis upon the plaintiff's ability to pay, the First Circuit held that it is an abuse of discretion for a district court to fail to consider the above mentioned factors in determining whether the bond requirement should be dispensed with. *See e.g. Aggarwal v. Ponce School of Medicine*, 745 F.2d 723, 727-29 (1st Cir. 1984). The court noted that:

> "[w]hile it is neither unjust nor unreasonable to expect a suitor 'to put his money where his mouth is,' *cf. In re Stumo*, 449 F.2d 1297, 1298 (1st Cir. 1971) (per curiam), toll-booths cannot be placed across the courthouse doors in a haphazard fashion. The district court, in the exercise of its sound discretion, must settle upon an assurance which is fair in the light not only of the case itself and of the exigencies faced by the defendant, but also fair when illuminated by the actual financial situation of the plaintiff. The rule is a scalpel, to be used with surgical precision as an aid to the even-handed administration of justice, not a bludgeon to be employed as an instrument of oppression.

Id., at 728.

Other courts have rejected arguments similar to those presented by Plaintiffs, but without conducting a detailed analyses [sic]. *See e.g., Brewster v. North Am. Van Lines, Inc.*, 461 F.2d 649 (7th Cir. 1972); *Kreitzer v. Puerto Rico Cars, Inc.*, 417 F. Supp. 498 (D.P.R. 1975); *Russell v. Cunningham*, 233 F.2d 806, 811 (9th Cir. 1956).

Plaintiffs' arguments have not received strong support by courts in the past. Florida's bond requirement, however, seems unique in its failure to allow a court to dispense with the requirement when warranted by a plaintiff's indigence. Thus, particularly in light of the First Circuit opinions, Plaintiff's have presented a number of colorable claims. For reasons stated below, however, the Court will abstain from hearing this matter until after the state courts have the opportunity to construe the challenged statute in light Article I, § 21 of the Florida Constitution.

Article I, § 21 of the Florida Constitution provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." The Florida Supreme Court has held that this right should be "construed liberally in order to guarantee broad accessibility to the courts for resolving disputes." *Psychiatric Associates v. Siegel*, 610 So.2d 419, 424 (Fla. 1992). The Court accordingly has held that the right to access the courts may be abrogated only under two narrow circumstances:

> Although courts generally oppose any burden being placed on the right of a person to seek redress of injuries from the courts, the legislature may abrogate or restrict a person's access to

> the courts if it provides: 1) a reasonable alternative remedy or commensurate benefit, or 2) a showing of an overpowering public necessity for the abolishment of the right, *and* finds that there is an alternative method of meeting such public necessity.

Id. (citations omitted) (emphasis in original).

While Plaintiffs' argument would be one of first impression in the Florida courts, it appears to have substantial merit. Thus, this case may well be resolved on the basis of the Florida constitutional provision alone. It is a fundamental principle of federal jurisprudence that courts should avoid reaching federal constitutional claims if possible. As noted by the Supreme Court, "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944), *quoted in Church of Scientology Flag Service Org., Inc. v. City of Clearwater*, 777 F.2d 598, 604 (11th Cir. 1985), *cert. denied*, 476 U.S. 1116 (1986).

In light of this principle, and in an effort to avoid unnecessary friction between state and federal courts, the Supreme Court approved the doctrine of abstention in the seminal case of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Abstention allows a federal court to withhold adjudication on federal constitutional claims when it appears that the conflict presented may be avoided solely on state law grounds. By abstaining from a case, a federal court also avoids interfering with "important state functions," ruling on tentative issues of state

law, and deciding federal constitutional claims prematurely. *Harman v. Forssenius*, 380 U.S. 528, 534 (1965); *Southern Ry. Co. v. State Bd. of Equalization*, 715 F.2d 522, 527 n.10 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); Charles A. Wright, *Handbook of the Law of Federal Courts*, The Abstention Doctrines § 52.

Abstention should not be ordered where the state law is clear on its face, or if its meaning has been previously determined by a state court, or if the federal constitutional issue would have to be addressed regardless of how the state law were construed. Instead, the state law must be "fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question." *Harman v. Forssenius*, 380 U.S. 528, 534-35 (1965), quoted in *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 306 (1979); *Edwards v. Sammons*, 437 F.2d 1240, 1244 (5th Cir. 1971); *see also Barrett v. Atlantic Richfield Co.*, 444 F.2d 38, 40 (5th Cir. 1971).

Since this entire case may be resolved on state constitutional grounds, abstention seems particularly appropriate here. Plaintiffs are challenging the validity of state statute [sic] on state constitutional grounds. There are no reported cases that have considered § 57.011 in light of Art. I § 21, nor is there any definitive guidance as to how the Supreme Court of Florida would rule if presented with this issue. Thus, the validity of the statute is uncertain. *Ibarra v. Bexar County Hosp. Dist.*, 624 F.2d 44, 47 (5th Cir. 1980); *see also Johns Manville Products Corp. v. Doyal*, 510 F.2d 1196, 1198 (5th Cir. 1976), citing *Reetz v. Bozanich*, 397 U.S. 82, 86 (1970); *Harman v. Forssenius*, 380 U.S. 528, 534 (1965); *Gray Line Motor Tours, Inc. v. City of New*

Orleans, 498 F.2d 293, 298 (5th Cir. 1974); Moore's Federal Practice, 0.203 (2d ed.); C. Wright, *Federal Courts* § 52 (2d ed.). The state courts have not had the opportunity to address this issue in the past, and it would be awkward for this Court to rule on this matter of first impression. While the statute seems clear on its face, Plaintiffs have made a plausible argument that it violates the Florida Constitution. Where a state statute is clear, but there is a fair possibility that it violates the state's constitution, abstention is proper so long as the state constitutional provision is not "the mirror of the federal one." *Herald Co. v. McNeal*, 553 F.2d 1125, 1130 n.8 (8th Cir. 1977). *See also, Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 598 (1976). In this case there is no similar provision in the federal Constitution.

While "we . . . cannot ignore that abstention operates to require piecemeal adjudication in many courts . . . thereby delaying ultimate adjudication on the merits for an undue length of time," *Baggett v. Bullitt*, 377 U.S. 360, 375-79 (1964), in this case, Plaintiffs claims stem from various law suits which have been brought, and which Plaintiffs intend to bring, in state courts. Thus, this litigation became more piecemeal when the parties attempted to drag the federal court into their dispute. The state court should have the first crack at this issue. This may actually save time by avoiding shuttling back and forth between state and federal court, instead of delaying the ultimate disposition of this case.

This Court will accordingly abstain from any further proceedings in this case until the parties have the opportunity to [sic] the state court the issue of whether Fla.Stat.

§ 57.001 [sic] violates Art. I, § 21 of the Florida Constitution. Should the Plaintiffs choose to submit all of their claims to the state court, they should feel free to do so. *National Ass'n for the Advancement of Colored People v. Sutton*, 371 U.S. 415 (1963). Plaintiffs may, however, reserve their federal claims for adjudication by this Court, should such adjudication become necessary. *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 421-22 (1964).

The Court has reviewed the motion and the record, and being otherwise duly advised, it is hereby:

ORDERED and **ADJUDGED** that as follows:

1. Plaintiffs' Motion for Preliminary Injunction, filed on January 5, 1996, is **DENIED** without prejudice:

2. Pursuant to the doctrine announced in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), this Court hereby ABSTAINS from any further proceedings in this matter pending the resolution of Plaintiffs' state court claims in state court;

3. All proceedings in this matter are **STAYED**;

4. Plaintiffs are directed to file status reports with this Court every three (3) months, outlining the progress of the state court proceedings;

5. Should this matter be resolved such that this [sic] the federal issues in this case become moot, the parties shall notify this Court immediately;

6. Should the state court finally deny the relief sought by Plaintiffs, Plaintiffs shall move this Court to reopen this case;

7. This case is CLOSED for administrative purposes.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this 26th day of February, 1996.

/s/ Jose A. Gonzalez, Jr.
JOSE A. GONZALEZ, JR.
UNITED STATES DISTRICT JUDGE

cc: Counsel